

FERC and California to Coordinate Hydrokinetic Project Review

By Matt Love and Julia Wood

On May 18, 2010, the Federal Energy Regulatory Commission (FERC) announced that it had entered into a Memorandum of Understanding (MOU) with three California State agencies—the California Natural Resources Agency, the California Environmental Protection Agency, and the California Public Utilities Commission—to coordinate the review and approval of hydrokinetic projects in California waters. The MOU is the fourth such agreement that FERC has entered into to promote coordinated federal and state authorization of hydrokinetic projects; FERC signed substantially similar agreements with the State of Oregon in March 2008, the State of Washington in June 2009, and the State of Maine in August 2009.

SUMMARY

Like FERC's previous agreements, the MOU sets forth a number of principles for guiding FERC and the signatory state agencies' coordinated and timely processing of preliminary permit and license applications for hydrokinetic projects in California waters. These include:

- Acknowledging the state's intention to develop siting recommendations for hydrokinetic project development in California, which FERC will consider incorporating as permit or license conditions;
- Recognizing that limited testing of experimental hydrokinetic technology may not require FERC authorization—under FERC's policy first set forth in *Verdant Power LLC*, 111 FERC ¶ 61,024 (2005) and recently applied in *Maine Maritime Academy*, 130 FERC ¶ 62,234 (2010)—but would still require appropriate state authorizations;
- Encouraging applicants to seek short-term licenses through FERC's expedited pilot licensing process prior to seeking full commercial operation of a project under FERC's standard licensing process, to allow adequate testing of new hydrokinetic technologies;
- Coordinating environmental review of hydrokinetic projects, such that FERC's environmental documents prepared under the National Environmental Policy Act (NEPA) may be used by California to satisfy the requirements of the California Environmental Quality Act, the state's "mini-NEPA" statute;
- Conferring with the Minerals Management Service (MMS) as early as possible for hydrokinetic projects proposed to be located on the Outer Continental Shelf (OCS)—where MMS shares jurisdiction with FERC—and/or on both the OCS and in state waters, so that the processing of such applications does not involve two separate state review processes; and



- Sharing information from project developers about a proposed hydrokinetic project’s energy production, in an effort to evaluate the potential of the project to meet California’s renewable energy development policies and renewable energy portfolio standards.

The MOU includes a commitment by the signatory California agencies to confer with other state agencies such as the California State Water Resources Control Board (SWRCB) early in the process to create a schedule for expeditiously processing hydrokinetic project applications. Notably, the SWRCB—the state agency with authority to issue water quality certifications for hydropower projects under section 401 of the Clean Water Act—is not a party to the MOU. This is a departure from FERC’s previous agreements with Oregon, Washington, and Maine, in which the state water quality certification agency has been a party to the agreement. Because of the significant authority of water quality certification agencies in the hydropower licensing process, unless FERC enters into a separate agreement with the SWRCB to coordinate the process and timing of water quality certifications for hydropower projects in California, the overall effectiveness of the MOU could be limited.

The MOU is FERC’s latest initiative to promote the development of—and streamline the approval process for—hydrokinetic projects. It follows not only FERC’s similar agreements with the States of Oregon, Washington, and Maine, but FERC’s support of the development of hydrokinetic projects through its pilot licensing process and *Verdant* policy. The MOU is especially notable because of its potential to expedite the development of wave energy projects in California waters. FERC has issued more preliminary permits for wave energy projects in California than in any other state.

FOR ADDITIONAL INFORMATION

Van Ness Feldman provides counsel and representation to utilities and other developers in obtaining hydropower licenses, permits and other authorizations from FERC, as well as from other federal and state agencies that regulate hydropower facilities. If you would like additional information about the MOU or the regulation of hydrokinetic energy projects generally, please contact [Julia Wood](#) in our Washington, D.C. office, [Matt Love](#) in our Seattle, Washington office, or any other member of the firm’s Hydropower Practice at (202) 298-1800.

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